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No. 93-7657
No. A-___

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

DAVID LAWSON,

Petitioner,

v.

GARY DIXON, Warden, Central Prison
Raleigh, North Carolina,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND RESPONSE TO MOTION FOR STAY OF EXECUTION

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QUESTIONS PRESENTED

I. DOES TRIAL COUNSEL RENDER INEFFECTIVE ASSISTANCE OF COUNSEL BY NOT MAKING FURTHER INVESTIGATION OF POSSIBLE MENTAL HEALTH MITIGATION AFTER A COMPETENT AND SEEMINGLY RATIONAL CLIENT MAKES A KNOWING DECISION NOT TO PRESENT MITIGATION EVIDENCE AT HIS CAPITAL SENTENCING HEARING?

II. DO THE SENTENCING INSTRUCTIONS GIVEN IN THIS CASE VIOLATE THE DICTATES OF MILLS V. MARYLAND, 486 U.S. 367 (1988) OR MCKOY V. NORTH CAROLINA, 494 U.S. 433 (1990) WHERE, AS HERE, THERE IS NO MENTION OF UNANIMITY IN THE INSTRUCTIONS ON CONSIDERING MITIGATING EVIDENCE?

III. DID THE FOURTH CIRCUIT PROPERLY HOLD LAWSON UNENTITLED TO A FURTHER EVIDENTIARY HEARING ON THE VOLUNTARINESS OF HIS WAIVER OF HIS RIGHT TO PRESENT MITIGATING EVIDENCE DURING HIS SENTENCING HEARING, WHERE, AS HERE, THE RECORD WAS FULLY DEVELOPED IN STATE COURT?

IV. DID THE FOURTH CIRCUIT COURT OF APPEALS PROPERLY AFFIRM THE DISTRICT COURT'S RULING THAT LAWSON WAS UNENTITLED TO A FURTHER EVIDENTIARY HEARING ON HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL WHERE, AS HERE, THE RECORD WAS FULLY DEVELOPED IN STATE COURT?

TABLE OF CONTENTS

QUESTIONS PRESENTED.....*

TABLE OF AUTHORITIES.....i

CITATIONS TO OPINIONS BELOW.....2

JURISDICTION.....2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....3

STATEMENT OF THE CASE.....3

A. Procedural History.....3

B. Statement of Facts.....11

1. Trial Evidence.....11

2. Motion for Appropriate Relief.....15

3. Writ of Habeas Corpus.....20

REASONS WHY THE WRIT OUGHT NOT ISSUE.....22

I. TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL IN THEIR INVESTIGATION OF POSSIBLE MENTAL HEALTH MITIGATION WHERE, AS HERE, A COMPETENT AND SEEMINGLY RATIONAL CLIENT DEMANDS NO MITIGATING EVIDENCE BE PRESENTED AT HIS SENTENCING HEARING.....22

II. THE INSTRUCTIONS GIVEN IN LAWSON'S CASE ARE NOT VIOLATIVE OF MILLS V. MARYLAND, 486 U.S. 367 (1988) OR MCKOY V. NORTH CAROLINA, 494 U.S. 433 (1990), EVEN ASSUMING RETROACTIVE APPLICATION OF MILLS AND MCKOY TO CASES FINAL WHEN THOSE OPINIONS ARE ANNOUNCED.....35

III. THE FOURTH CIRCUIT PROPERLY HELD LAWSON UNENTITLED TO A FURTHER EVIDENTIARY HEARING IN FEDERAL COURT CONCERNING WHETHER HE KNOWINGLY AND VOLUNTARILY WAIVED HIS RIGHT TO PRESENT EVIDENCE IN MITIGATION DURING HIS SENTENCING HEARING.....45

TABLE OF AUTHORITIES

Ake v. Oklahoma, 470 U.S. 68 (1985).....27n

Autry v. McKaskle, 727 F.2d 358 (5th Cir.), cert. denied, 465 U.S. 1085 (1984).....23, 49, 57

Barefoot v. Estelle, 463 U.S. 880 (1981).....2

Blackledge v. Allison, 431 U.S. 63 (1977).....52

Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991).....24, 32, 34

Boyde v. California, 494 U.S. 370 (1990).....40

Brecht v. Abrahamson, 113 S.Ct. 1710 (1993).....44, 45

Byrne v. Butler, 845 F.2d 501 (5th Cir.), cert. denied, 487 U.S. 1242 (1988).....32, 49, 56, 58

Card v. Dugger, 911 F.2d 1494 (11th Cir. 1990).....50, 51, 56

Clanton v. Bair, 826 F.2d 1354 (4th Cir. 1987), cert. denied, 484 U.S. 1036 (1988).....57

Cordova v. Collins, 953 F.2d 167 (5th Cir. 1992).....36

Engberg v. Meyer, 820 P.2d 70 (Wyom. 1991).....42

Fallada v. Dugger, 819 F.2d 1564 (11th Cir. 1987).....50

Felde v. Blackburn, 795 F.2d 400 (5th Cir. 1986).....23, 32, 56

Flugence v. Butler, 848 F.2d 77 (5th Cir. 1988).....56

Gardner v. Dixon, 966 F.2d 1442 (4th Cir. 1992) (unpublished), cert. denied, ___ U.S. ___, 113 S.Ct. 396 (1992).....43

Gardner v. Dixon, 979 F.2d 847, No. 92-4013 (4th Cir. 1992), cert. denied, ___ U.S. ___, 113 S.Ct. 396 (1992).....43

Godinez v. Moran, 509 U.S. ___, 113 S.Ct. 2680 (1993).....51

Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982), cert. denied, 461 U.S. 910 (1983).....34

IV. THE FOURTH CIRCUIT COURT OF APPEALS DID NOT CREATE AN IMPROPERLY HIGH STANDARD TO DETERMINE WHETHER OR NOT AN EVIDENTIARY HEARING WAS NECESSARY IN FEDERAL COURT ON THE ISSUE OF INEFFECTIVE ASSISTANCE OF COUNSEL. RATHER, THE COURT SIMPLY AFFIRMED THE DISTRICT COURT'S DETERMINATION HAT BASED ON A FULLY DEVELOPED RECORD NO FURTHER HEARING WAS NEEDED.....55

CONCLUSION.....60

Henderson v. Morgan, 426 U.S. 637 (1976).....49

Herrera v. Collins, ___ U.S. ___, 113 S.Ct. 853 (1993).....33

James v. Whitley, 926 F.2d 1433 (5th Cir. 1992).....44

Jeffries v. Blodgett, 988 F.2d 923
(9th Cir. 1993).....24, 40, 49

Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991).....24, 34

King v. Lynaugh, 868 F.2d 1400 (5th Cir. 1989),
cert. denied, 489 U.S. 1099 (1989).....32, 49, 50, 57

Knott v. Mabry, 671 F.2d 1208 (8th Cir. 1982).....33

Kordenbrock v. Scroggy, 680 F.Supp 867 (E.D. Ky. 1988),
aff'd, 889 F.2d 69 (6th Cir. 1989),
vacated and rehearing en banc granted, 896
F.2d 1457 (6th Cir. 1990), rev'd on other grounds,
919 F.2d 1091 (6th Cir. 1990)(en banc).....44

Kubat v. Greer, 493 U.S. 874 (1989).....41, 42, 43

Kubat v. Thieret, 867 F.2d 351 (7th Cir. 1989),
cert. denied sub nom.....41, 43

Lawson v. Dixon, 3 F.3d 743 (4th Cir. 1993).....2, 10, 43

Lawson v. Dixon, No. C-88-738-S (M.D.N.C., Nov. 19, 1991).....9

Lawson v. Dixon, No. C-88-738-S (M.D.N.C., Jan. 7, 1992).....9

Lawson v. North Carolina, 471 U.S. 1120 (1985).....4, 36

Lawson v. North Carolina, 485 U.S. 1016 (1988).....6

Maggio v. Williams, 464 U.S. 46 (1983).....2

Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992).....41, 42

Martin v. Maggio, 711 F.2d 1273 (5th Cir. 1983),
cert. denied, 469 U.S. 1028 (1984).....24, 32, 34

Maynard v. Dixon, 943 F.2d 407 (4th Cir. 1991),
cert. denied, ___ U.S. ___, 112 S.Ct. 1211
(1992).....39, 43

McDougall v. Dixon, 921 F.2d 518 (4th Cir. 1990),
cert. denied, ___ U.S. ___, 111 S.Ct. 2840

(1991).....40, 43

McDougall v. North Carolina, ___ U.S. ___, 111 S.Ct. 2840
(1991).....40

McKoy v. North Carolina, 494 U.S. 433
(1990).....8, 35, 36, 37, 38, 40, 41, 43, 45

Mills v. Maryland, 486 U.S. 367
(1988).....35, 36, 37, 38, 40, 41, 43, 45

Mitchell v. Kemp, 762 F.2d 886 (11th Cir. 1985),
cert. denied, 483 U.S. 1026 (1987).....24, 49

Rose v. Lundy, 455 U.S. 509 (1982).....6, 8

Schiro v. Farley, ___ U.S. ___, No. 92-7549 (1994).....37

Smith v. Dixon, 766 F.Supp. 1370 (E.D.N.C. 1991),
aff'd, 996 F.2d 667 (4th Cir. 1993),
rev'd on another issue, ___ F.2d ___
(4th Cir., Jan. 21, 1994)(en banc).....27

State v. Brantley, 427 S.E.2d 758 (Ga. 1993).....43

State v. Lawson, 314 S.E.2d 493
(N.C. 1984).....3, 11, 44

State v. Lawson, 364 S.E.2d 662 (N.C. 1988).....5

State v. Lawson, 367 S.E.2d 919 (N.C. 1988).....5

State v. Lawson, 397 S.E.2d 231 (N.C. 1990).....8

State v. Roger Warren Clark, 270 S.E.2d 425 (N.C. 1980).....15

Strickland v. Washington, 466 U.S. 668 (1984).....56

Teague v. Lane, 489 U.S. 288 (1989).....8, 36, 37

Thomas v. Jones, 742 F.Supp. 598 (S.D. Ala.),
aff'd, ___ F.2d ___ (unpublished),
stay and cert. denied, ___ U.S. ___, 111 S.Ct. 1
(1990).....36

Thomas v. Kemp, 796 F.2d 1322 (11th Cir. 1986).....34

Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986),
cert. denied, 481 U.S. 1042 (1987).....24, 34

Wilcher v. Hargett, 978 F.2d 872 (5th Cir. 1992).....36

Williams v. Dixon, 961 F.2d 448 (4th Cir.), cert. denied, ___ U.S. ___, 113 S.Ct. 510 (1992).....9, 36, 37

Woodard v. Hutchins, 464 U.S. 377 (1984).....2

Zettlemoyer v. Fulcomer, 923 F.2d 284 (3rd Cir. 1991).....36, 43

North Carolina General Statutes

N.C.Gen.Stat. §14-32(a).....53

N.C.Gen.Stat. §14-54 (1979).....53

N.C.Gen.Stat. §15-194 (1983).....2, 10

N.C.Gen.Stat. 15A-1002 (1988).....27

N.C.Gen.Stat. §15A-1371(c)(1978).....53

N.C.Gen.Stat. §15A-1411 (1978).....4

N.C.Gen.Stat. §15A-2000(f)(2).....20, 26

N.C.Gen.Stat. §15A-2000(f)(6) (1988).....20, 26

Other Authorities

28 U.S.C. §2254.....6

Fed.R.Civ.P. 59(b).....9

Fed.R.Civ.P. 60(e).....9

Supreme Court Rule 15.2.....3

Supreme Court Rule 24.2.....3

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND RESPONSE TO MOTION FOR STAY OF EXECUTION

The Respondent, Gary Dixon, Warden of Central Prison in Raleigh, North Carolina [hereinafter "State"], by undersigned counsel, the Honorable Michael F. Easley, Attorney General of North Carolina and Special Deputy Attorneys General Joan Herre Byers and Barry S. McNeill, opposes and requests that this Court deny the PETITION FOR WRIT OF CERTIORARI filed by Petitioner David Lawson [hereinafter "Lawson"] on January 24, 1994 requesting further review of the decision of the Fourth Circuit

Court of Appeals entered August 26, 1993 in Lawson v. Dixon, 3 F.3d 743 (4th Cir. 1993). The State also requests that this Court deny Lawson's MOTION FOR STAY OF EXECUTION so that Lawson's execution may be carried out as scheduled on Friday, February 18, 1994. Pursuant to North Carolina Law, N.C.Gen.Stat. §15-194 (1983), the granting of even a temporary stay requires that a new execution date be set no earlier than sixty to ninety days after any stay has been lifted or expires. Woodard v. Hutchins, 464 U.S. 377, 384 n.4 (1984) (Marshall J. dissenting).

For the reasons explained in this response, neither the MOTION FOR STAY, nor the PETITION FOR WRIT OF CERTIORARI upon which it is based, "reflect the presence of substantial grounds upon which relief might be granted." Barefoot v. Estelle, 463 U.S. 880, 895 (1981). There does not exist a reasonable possibility that four members of the Court would consider the issues raised sufficiently meritorious for the grant of certiorari. Maggio v. Williams, 464 U.S. 46, 48 (1983). Rather, the issues raised reflect merely the application of specific facts to settled rules of law and fail to reveal any substantial conflict among the circuits concerning these rules of law.

CITATIONS TO OPINIONS BELOW

JURISDICTION

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pursuant to Supreme Court Rules 15.2 and 24.2 these items are omitted since the State is satisfied with Lawson's statements of the CITATIONS TO OPINION BELOW, JURISDICTION, and CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

STATEMENT OF THE CASE

A. Procedural History

Lawson murdered Wayne Shinn and seriously injured Buren Shinn, Wayne's father, during a break-in at Wayne Shinn's home on December 4, 1980. Lawson was arrested on December 31, 1980. Lawson was appointed two counsel on December 31, 1980. On January 12, 1981, these counsel withdrew from representation. On January 12, 1981 James C. Johnson and Franklin R. Plummer were appointed to represent Lawson.

On March 19, 1981, a Cabarrus County Grand Jury indicted Lawson for first-degree murder, assault with a deadly weapon with intent to kill inflicting serious bodily injury, and felonious breaking or entering. Lawson was tried on pleas of not guilty at the May 26, 1981 session of Cabarrus County Superior Court and was found guilty as charged. On June 6, 1981, he received a sentence of death for the first-degree murder conviction.

The Supreme Court of North Carolina affirmed Lawson's convictions and death sentence on May 21, 1984. State v. Lawson,

314 S.E.2d 493 (N.C. 1984). Certiorari was denied on May 20, 1985. Lawson v. North Carolina, 471 U.S. 1120 (1985).

Lawson, through new counsel, filed a Motion for Appropriate Relief pursuant to N.C.Gen.Stat. §15A-1411 (1978) in the Superior Court of Cabarrus County on February 11, 1986, which was amended on May 6, 1986 and May 21, 1987. This Motion raised claims of ineffective assistance of counsel at trial and on direct appeal. Specifically, Lawson claimed that Mr. Johnson, his trial and appellate counsel, had rendered ineffective assistance of counsel with respect to (1) his motion to change venue; (2) jury selection; (3) the identification procedures employed at trial; (4) his failure adequately to challenge on direct appeal the sufficiency of the evidence to support aggravating factors at the sentencing phase; (5) his failure adequately to challenge the sufficiency of the evidence to support the jury's imposition of the death sentence; (6) his failure adequately to challenge the proportionality of the death sentence; (7) failure to present mitigating evidence during the penalty phase of the trial; (8) deficiencies in the preparation and filing of a petition for writ of certiorari in the Supreme Court of the United States; (9) deficiencies in the preparation of the record on appeal and the written brief in the Supreme Court of North Carolina (10) failure to challenge the excusal of certain jurors; and (11) failing to have closing arguments transcribed and presented to the Supreme Court on appeal. Lawson's motion, as amended, also challenged

the impartiality of the jury impaneled to try his case, the sufficiency of the evidence supporting the aggravating circumstances found by the jury and the State's excusal for cause of jurors with scruples against capital punishment, the alleged absence of a reliable sentencing determination because of the absence of mitigating evidence, and the unconstitutionality of a jury instruction imposing on the jury a duty to pronounce the death sentence if aggravating circumstances outweighed mitigating circumstances.

On May 26, 1987, an evidentiary hearing was held in the Superior Court of Cabarrus County before Superior Court Judge Thomas W. Seay, Jr. on Lawson's post-conviction claims, including ineffective assistance of counsel for failing to develop mitigation evidence and to ensure a reliable sentencing hearing. At the Hearing, Lawson's counsel represented that there were no other contentions to be included in Lawson's Motion for Appropriate Relief. The Superior Court denied relief in an order entered July 1, 1987.

On February 3, 1988, the Supreme Court of North Carolina denied Lawson's petition for writ of certiorari seeking review of Judge Seay's decision, State v. Lawson, 364 S.E.2d 662 (N.C. 1988), and on April 6, 1988 also denied Lawson's amended petition for writ certiorari, State v. Lawson, 367 S.E.2d 919 (N.C. 1988).

On February 17, 1988, Lawson's execution was rescheduled for April 22, 1988. On March 31, 1988, Lawson filed a Petition for

Writ of Certiorari and Motion for Stay of Execution in the United States Supreme Court, seeking review of the post-conviction judgment by Judge Seay.

On April 14, 1988, Lawson filed in the United States District Court for the Middle District of North Carolina a motion for stay of his execution pending disposition of his certiorari petition in the United States Supreme Court, in order to afford him time to file a Petition for Writ of Habeas Corpus. On April 19, 1988, United States District Judge Hiram H. Ward granted Lawson's motion, and directed that Lawson's habeas petition be filed within 60 days.

On April 20, 1988, the United States Supreme Court denied Lawson's petition for writ of certiorari and motion for stay. Lawson v. North Carolina, 485 U.S. 1016 (1988).

On July 18, 1988, Lawson filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 in the United States District Court for the Middle District of North Carolina. Lawson acknowledged that many of his claims raised in his habeas petition were new and had not been presented to the Superior Court of Cabarrus County in his previous Motion for Appropriate Relief. In recognition that the presentation of such a "mixed" petition would compel dismissal for non-exhaustion of state court remedies under Rose v. Lundy, 455 U.S. 509 (1982), on July 19, 1988 Lawson contemporaneously filed a second Motion for Appropriate Relief in the Superior Court of Cabarrus County,

raising the previously unexhausted claims he had presented for the first time in his habeas petition. On September 23, 1988, Lawson filed in Cabarrus County Superior Court a Notice withdrawing his second Motion for Appropriate Relief, noting that the same claims therein also were pending in his federal habeas proceeding; that the State had waived exhaustion and consented to federal adjudication of these claims.

On November 1, 1988, the State filed its answer to Lawson's habeas petition, explicitly waiving the exhaustion defense to the unexhausted claims. Lawson filed a traverse to the answer on February 3, 1989, and subsequently filed an ex parte motion for the appointment of a psychiatric expert to assist in the development and presentation of his mental health habeas claims, or in the alternative for an ex parte evidentiary hearing to show that expert psychiatric services were reasonably necessary to the full and fair adjudication of these claims. In support, Lawson proffered the affidavit of Dr. Billy Royal, the psychiatrist he asked the court to appoint, which stated that Dr. Royal already had formed his opinion on Lawson's alleged lack of competency and inability to waive his right to a sentencing hearing and desired further evaluation of Lawson in order to study possible mitigation.

On April 6, 1989, the Magistrate-Judge held a hearing at which Lawson was required to reveal to the State the basis for his motion to appoint a psychiatric expert. After the hearing,

the Magistrate-Judge required Lawson to Brief and identify those habeas claims for which he had requested an evidentiary hearing on the appointment motion. On May 12, 1989, the State replied with a motion to dismiss the habeas petition in its entirety, contending that the appointment motion so altered Lawson's habeas petition that it, in essence, raised a new, unexhausted claim, which should be dismissed pursuant to Rose v. Lundy.

On March 16, 1990, Lawson filed in the Supreme Court of North Carolina a motion to remand for the imposition of a life sentence based upon the intervening decision in McKoy v. North Carolina, 494 U.S. 433 (1990). On March 21, 1990, Lawson also filed in federal district court a motion to defer further proceedings on his habeas petition pending re-exhaustion of his McKoy claim. On May 18, 1990, Magistrate Eliason ordered that Lawson's habeas petition be held in abeyance until the Supreme Court of North Carolina had ruled on McKoy and Lawson's motion to remand. On October 5, 1990, the Supreme Court of North Carolina dismissed Lawson's motion to remand, State v. Lawson, 397 S.E.2d 231 (N.C. 1990) and the federal district court subsequently activated Lawson's habeas action.

On August 16, 1991, the Magistrate-Judge permitted the State to amend its answer to raise the defense of non-retroactivity pursuant to Teague v. Lane, 489 U.S. 288 (1989).

Following further briefing by both parties, on November 19, 1991, the Magistrate-Judge filed his recommendations that

Lawson's habeas petition be dismissed and that Lawson's motions for discovery, appointment of a psychiatric expert, and an evidentiary hearing be denied. Lawson v. Dixon, No. C-88-738-S (M.D.N.C., Nov. 19, 1991) (ORDER AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE). On December 17, 1991, Lawson filed objections to the Magistrate's findings and recommendations. On January 7, 1992, United States District Judge Frank W. Bullock, Jr. adopted the magistrate's recommendations, and entered a Judgment dismissing the petition. Lawson v. Dixon, No. C-88-738-S (M.D.N.C., Jan. 7, 1992) (JUDGMENT and ORDER of United States District Judge Frank W. Bullock, Jr.).

On January 22, 1992, Lawson moved to alter or amend the judgment pursuant to Fed.R.Civ.P. 59(e), and alternatively for relief from the judgment pursuant to Fed.R.Civ.P. 60(b). The State filed a response in opposition on February 7, 1992. On February 26, 1992, Judge Bullock denied Lawson's motions.

On March 18, 1992, Lawson filed a second motion for relief from the judgment pursuant to Fed.R.Civ.P. 60(b) based on Williams v. Dixon, 961 F.2d 448, 451-59 (4th Cir.), cert. denied, ___ U.S. ___, 113 S.Ct. 510 (1992). The State filed a response in opposition on March 27, 1992. Meanwhile, on March 20, 1992, Lawson filed an application to extend the stay of his execution, and for a certificate of probable cause to appeal. Lawson filed a notice of appeal on March 27, 1992. The State filed a response in opposition to Lawson's application for an extension of the

stay and certificate of probable cause, and on March 31, 1992, Judge Bullock denied Lawson's motions, finding he had failed to make a substantial showing of the denial of a federal right. On April 7, 1992, Lawson filed a renewed notice of appeal as to both the dismissal of his habeas petition and the denial of his Rule 60(b) motion.

On April 8, 1992, and faced with a pending hearing to reschedule his execution date pursuant to N.C.Gen.Stat. §15-194 (1983), Lawson filed an Application for Stay of Execution and Certificate of Probable Cause and Supporting Memorandum in the United States Court of Appeals for the Fourth Circuit. The State filed a response in opposition on April 11, 1992, and on April 17, 1992 the Fourth Circuit entered an Order staying the setting of Lawson's execution by the State of North Carolina "during the pendency of this appeal or until further order of this Court." The Fourth Circuit granted a certificate of probable cause for Lawson's appeal.

On August 26, 1993, the Fourth Circuit panel issued a unanimous decision affirming the District Court's denial of federal habeas relief. Lawson v. Dixon, 3 F.3d 743 (4th Cir. 1993). On October 26, 1993, the Fourth Circuit also denied Lawson's petition for rehearing and suggestion for rehearing in banc.

B. Statement of Facts

1. Trial Evidence

The trial evidence, as summarized by the Supreme Court of North Carolina in State v. Lawson, 314 S.E.2d at 495- 97, is as follows:

> In December 1980, Buren Shinn resided in a house on Old Salisbury Road, approximately three miles from Concord. Buren's son, Wayne Shinn, lived in a house located about 100 yards away. Buren and Wayne worked together in a family electrical business.
>
> After driving to his father's home on 4 December 1980, Wayne heard the burglar alarm at his own home. Wayne and Buren jumped into a truck and rushed over to Wayne's house, where they observed a dirty brown Ford parked in the driveway. Wayne got out of the truck and ran towards the patio at the side of his house. Buren then saw Wayne throw up his hands and heard a gun fire.
>
> Buren ran to the truck, got in and began backing the truck in an effort to get away. Lawson ran toward him, waving a pistol. This sight diverted Buren's attention and he backed the truck into a ditch. Lawson approached the truck and ordered Buren to get out and move towards Wayne's house. Buren did so, pleading with Lawson not to hurt him.
>
> Before Buren reached the house, he heard another gunshot and felt a sharp blow to his head. He fell to the ground and lost consciousness. Sometime later he "came to," finding himself lying in a large pool of blood. Fearing that Lawson might still be in the vicinity, he lay silently. Some twenty or thirty minutes later, he heard someone walk toward him and he felt a hand reach into his pocket and take his wallet.
>
> Buren remained motionless for another twenty minutes. Hearing no more footsteps, he partly raised himself up. Seeing no one, he crawled away

from the patio toward the road, hoping to stop a passing car. When no one stopped, he struggled to his feet and walked toward his home. As he entered his home, another son, Jerry, saw him and telephoned for help. After Jerry was told what had happened, he left to see about Wayne.

Law enforcement officers arrived at Wayne's house and found him lying in a pool of blood in the basement near the patio. Wayne and Buren were taken to a hospital where Wayne was pronounced dead as the result of a bullet wound in the back of his head. Buren's injuries were not life threatening since the bullet which struck him did not penetrate his skull. He recovered after a short stay in the hospital.

The police found Wayne's house ransacked. They found several jewelry items and a camera in a pillowcase, apparently dropped by the intruder. Marks on the kitchen door indicated the house had been forcibly entered.

Phyllis Soden, who had known Lawson for several years, returned to her home from work at about 4:00 a.m. on 4 December 1980. Shortly after 9:00 a.m. Lawson went to her home and stated that he needed her to take him some place immediately. Leaving his dirty brown Ford in her driveway, the two departed in her automobile. Lawson directed her to drive on the Old Salisbury Road. As they neared the Shinn home he told her to stop, let him out, drive a short distance farther, turn around and return to pick him up. She followed Lawson's directions. When she returned, he ran to the car carrying a crowbar.

After they returned to Ms. Soden's home, Lawson explained that he had broken into a house and had left the crowbar there. He wanted to retrieve the bar because it might have his fingerprints on it. A little while later, Lawson showed her a wallet and removed the money from it. Thereafter, he told her: He had broken into a house after hearing that the residents had gold and jewelry. He found some items and stuffed them into a pillowcase. As he was preparing to leave, a man entered the patio door. He pointed his gun at the man who put up his hands. He ordered the man to turn around and shot him in the back of his

head. After the man fell, he ran out of the house. When he left the house, he saw another man approaching the patio. The other man turned, ran and entered a truck. He ordered the man out of the truck; and although the man begged Lawson not to shoot, Lawson forced him to walk toward the patio and shot him in the back of his head. He was confident both of the other men were dead because he shot them at close range. He killed them to eliminate witnesses because he did not want to go back to prison.

Lawson offered no evidence at the guilt-determination phase of the trial.

The jury convicted Lawson of assault with a deadly weapon with intent to kill inflicting serious injury upon Buren Shinn and felonious breaking of the home of Wayne Shinn. It also convicted him of the first-degree murder of Wayne Shinn.

The following transpired at the sentencing phase of the murder case. Outside the presence of the jury Lawson was examined under oath by one of his lawyers. During this examination Lawson testified that his counsel had fully advised him regarding the nature of the sentencing phase of the proceeding. Lawson also acknowledged that on that day, June 6, 1981 he signed an affidavit in which he acknowledged that he told his attorney, Mr. Johnson, on at least five separate occasions . . . that should I be found guilty, then in the second trial dealing with punishment, I wished to have my attorney seek and request the death penalty. I do not wish to spend the rest of my life in jail. I had rather have the death penalty than a life term. I understand my right to a second trial at which the jury will consider both mitigating and aggravating circumstances. I have, nevertheless, for some months before the trial told my attorney I do not want a life sentence, but a death sentence and I want him to take such legal steps as may be necessary to see that the sentence is carried out.

The trial judge then advised Lawson that notwithstanding his desire to be sentenced to death, the jury must make that decision and that the court by law was required to submit whatever

aggravating and mitigating circumstances were supported by the evidence. The trial judge said, "Even though you may ask the jury to recommend the death sentence in this case, the jury is not bound by it and the jury may . . . still see fit to recommend life imprisonment." The Court also determined from questioning that Lawson understood what the Court had said and that the paper writing, in fact, accurately expressed what he desired done.

The jury was then brought back into the courtroom. Lawson testified before the jury that his criminal record consisted of "two cases of breaking and entering some years ago in Stanly County." He had assisted the State "involving some criminal matters in Stanly County some years ago." The following colloquy then occurred:

> Q. At this time would you tell the jury what your request is regarding their decision?
>
> A. I'd like the death penalty.
>
> Q. Would you care to tell us why you want the death penalty?
>
> A. To be locked up in prison for something I did not do, is truly cruel and inhuman. I didn't do it. I don't care what anybody says. I'm innocent. That to be put in prison for life that's not right. You think I done it, gas me.
>
> Q. And you're - you know what you're asking?
>
> A. Yes, sir.
>
> Q. You know it's my responsibility to try to save your life?
>
> A. Yes, sir.
>
> Q. That's all.

There was a brief cross-examination by the State during which Lawson admitted that he owned a .32 caliber pistol in September 1980; he had

> attempted to purchase a pistol shortly after 4 December 1980; and on 4 December 1980 he had gone to Salisbury with Phyllis Soden. At the guilt phase of his trial a ballistics expert had testified that the bullet which killed Wayne Shinn was a .32 caliber bullet.

The jury, after finding in aggravation of the murder that the murder was for the purpose of avoiding arrest and that the murder was part of a course of conduct in which Lawson engaged which included the commission of other crimes of violence, and finding that mitigation was present, determined based on further findings that Lawson should be sentenced to death for the murder of Wayne Shinn.

2. Motion for Appropriate Relief

James C. Johnson, Jr., one of Lawson's trial lawyers and his appellate counsel, testified that he has practiced law since 1962 when he graduated in the top ten of his class from Wake Forest Law School. He clerked for two federal judges and then went into private practice. Over the years he has had an extensive criminal practice and has tried eight to ten first-degree murder cases. Prior to the trial of the Lawson case, Johnson tried State v. Roger Warren Clark, 270 S.E.2d 425 (N.C. 1980). In that case Johnson made a successful change of venue motion and presented mitigating evidence. As a state senator representing Cabarrus County, Johnson helped author much of the present North Carolina death penalty statute.

Johnson testified that he and Frank Plummer were appointed in January 1981 to represent Lawson. He did not know the Shinns personally but knew they were a respected family in the Mt. Gilead Community. Johnson filed a motion requesting a change of venue due to pretrial publicity, nature of the crime, reputation of the deceased's family, and sentiment and resentment in the community over the crime. He presented news clippings and several reporters at the hearing. He elicited from the reporters the word-of-mouth publicity and local prominence of the Shinn family. In preparation for this hearing he talked to people at the various eating establishments where the "courthouse crowd" gathered and could find no one who would testify they felt that Lawson could not receive a fair trial. He also checked at the junk yards and bars and did not find the strength of opinion he expected. After the motion for change of venue was denied, Johnson got the jury list and the responses the potential jurors gave to the questionnaire sent out by the Court. He drove around the county and looked at the addresses. He or his co-counsel went over the jury lists with Lawson to determine which jurors appeared favorable.

As a matter of strategy he waited until trial to object to Mr. Shinn's identification of Lawson so that Shinn would not have his identification reinforced by seeing Lawson again. At trial Johnson felt Mr. Shinn would be under maximum pressure. As part of this strategy, Lawson agreed to waive his presence at the

pretrial change of venue hearing so Mr. Shinn would not see him then.

Johnson and Plummer also did much investigation of Lawson's possible mitigation. They found little mitigation of worth. Mr. Johnson and Mr. Plummer, not predicessor counsel, as Lawson mistakenly asserts, moved for a competency hearing as soon as they got into the case. The unopposed motion was granted. The Court's order was prepared on firm paper. At the time the Motion was made Lawson asked Johnson if he thought he was crazy. Johnson stated, no that he wanted to make certain Lawson got some help if there were any serious mental problem. Johnson and Lawson then went over what Lawson should expect during the examination and for Lawson to be careful about discussing the facts of the case with the Dorothea Dix personnel. When Lawson was sent to Dorothea Dix, he was found competent to stand trial and there was nothing of mitigating value in that evaluation, in counsels' opinion. Lawson appeared to Mr. Johnson to be intelligent, manipulative, and fully in control. When the competency evaluation came back, Johnson reviewed it with Lawson and Lawson pointed out to Johnson that he had not done anything at Dorothea Dix to reveal any facts in the case. In conversations with Johnson, Lawson never indicated that he thought he had any type of mental or emotional problem. Lawson told Johnson he did not use drugs. In working with Lawson, Mr. Johnson formed the opinion Lawson was well read and highly

intelligent. Johnson never had any problem working with Lawson. Johnson, who had minored in psychology in college, found Lawson's thought processes and his practice of reason and logic to the best of any client he had ever represented.

Lawson told Johnson not to contact his family since he had not been close to them for the last five to seven years. Johnson considered contacting them anyway, but decided the lack of contact with Lawson would render them ineffective witnesses. After Lawson stated he would rather get the death sentence than life imprisonment if he was convicted, Johnson did not request a further mental evaluation of Lawson since he felt Lawson's decision was a careful, thought-out, philosophical explanation. It was not a suddenly arrived at decision.

After initially denying complicity in the case, Lawson admitted to Johnson that he had murdered Wayne Shinn and wounded Buren Shinn. He told of his total lack of remorse over the incident other than that both men did not die. He explained he shot them so they could not identify him. With Lawson's knowledge, Johnson taped several of his conversations with Lawson concerning the crime, his desire to get the death penalty if found guilty, and his background. Prior to trial, Johnson obtained complete discovery from the State. Lawson never suggested he murdered Wayne Shinn because he was drugged or upset. He clearly stated he killed Wayne to avoid being identified because he did not wish to go back to prison.

During the trial, the strategy decisions were made by Johnson. However, he would ask Lawson if he felt anything further should be asked prior to relinquishing a witness on cross-examination. He made certain Lawson was well-dressed and coached him on trial behavior. Johnson attempted to elicit mitigation evidence during cross-examination.

The fact that Lawson repeatedly stated he desired the death penalty if found guilty did not stop Johnson from investigating possible mitigation. Through Lawson's sentencing testimony, Johnson attempted to introduce mitigation evidence about his lack of significant prior criminal activity, his lack of contact with his family, and other issues, but Johnson felt Lawson undercut him by asking the jury to return a sentence recommendation of death if the jury though he had committed the murder. Johnson argued for life despite Lawson's request for death.

Tim Hawkins, a Cabarrus County lawyer, testified that he withdrew from representing Lawson because his secretary was a friend of the Shinn family. He spoke to Lawson and Lawson agreed that it would be better if he did not represent Lawson. Hawkins was not asked about and did not testify to any concern about Lawson's competency during the time he briefly represented him. Hawkins stated that James Johnson and Frank Plummer enjoyed excellent reputations as attorneys.

3. Writ of Habeas Corpus

Lawson proffered an affidavit dated January 27, 1989 from Billy Royal, a physician formerly with Dorothea Dix Hospital who is now privately practicing as a "forensic" psychiatrist. Dr. Royal found fault with the competency evaluation given Lawson since the Dorothea Dix staff, in accordance with Lawson's request, did not contact Lawson's family in Michigan. Dr. Royal then opined based on his examination of the Dorothea Dix material as well as several interviews with Lawson that Lawson was incompetent at the time of sentencing and that Lawson was unable, due to Lawson's mental state to waive in a knowing and voluntary manner his right to a sentencing hearing. He also opined that due to drug use, and Lawson's alleged long-term mental disorders, two of the statutory mitigating circumstances, "mental and emotional disturbance" N.C.Gen.Stat. §15A-2000(f)(2) and "capacity to appreciate the criminality of conduct was impaired", N.C.Gen.Stat. §15A-2000(f)(6) likely were present from the evidence.

Lawson also proffered an affidavit from his mother detailing Lawson's childhood. She stated he was generally a happy child, but that after she remarried, his step-father was not accepting of him and favored David's half brother. She told of his going to reform school as a teenager due to his being caught stealing something. She did not detail any incident of prior psychiatric intervention when Lawson was a child or a young man.

The Magistrate-Judge ordered the record expanded to include the records on Lawson's competency evaluation at Dorothea Dix Mental Hospital.

The report of the psychiatrist, Dr. Groce, which had been sent to the lawyers prior to trial, found Lawson to have an adjustment disorder with depressed mood but found that Lawson was fully competent to proceed to trial.

His mental status upon admission showed him to be "alert and cooperative. His stream of mental activity was normal. He denied hallucinations and delusions. He reported previous suicidal thoughts and one attempt but denied suicidal intent at the time of admission. His memory, judgment and intellect all appeared within average limits." (Respondent's Appendix C, 1)

The psychological tests showed Lawson scored a 107 on the IQ test and his reading test was at ninth grade level or above. Mr. Lawson's Bender Gestalt figures did not suggest serious organicity. His projective drawings suggested significant psychopathology including a low self-esteem with feelings inferiority, insecurity and inadequacy. Mr. Lawson's MMPI profile suggested anxiety, depression and nervousness in a patient who is likely to accentuate his complaints by a tendency to be self-dramatic. The psychiatrist noted based on the test results such persons may be expected to be chronically hostile and resentful and to sue projection and acting out as preferred defense mechanisms. Impulse control is likely to be deficient.

Expression of hostility and depression often form a cyclic pattern. Such patients are typically self-centered and dependent with an exaggerated need for affection.

The Hospital course revealed Lawson presented no management problem, that he was cooperative, and required no medication. He was given no medications upon discharge. (Respondent's Appendix C, 1-2)

The Magistrate-Judge by Order dated September 24, 1991 requested the parties to supplement the record with any additional material they desired on the issue of Lawson's competency. Thereafter, on November 19, 1991 the Magistrate Judge entered a recommendation that the writ of habeas corpus filed in this matter be denied. The United States District Court, on January 7, 1992, accepted these findings and ordered the petition dismissed.

REASONS WHY THE WRIT OUGHT NOT ISSUE

I. **TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE OF COUNSEL IN THEIR INVESTIGATION OF POSSIBLE MENTAL HEALTH MITIGATION WHERE, AS HERE, A COMPETENT AND SEEMINGLY RATIONAL CLIENT DEMANDS NO MITIGATING EVIDENCE BE PRESENTED AT HIS SENTENCING HEARING.**

Lawson, trying to create a certiorari worthy issue in this case where there is none, asserts that the Fourth Circuit, in alleged conflict with holdings from other circuits, has held that counsel need not investigate possible mitigating evidence in the

area of mental instability once a competent yet seriously impaired client instructs counsel he desires the death penalty. The Fourth Circuit, in affirming the unpublished opinion of the United States District Court for the Middle District of North Carolina, has not so held. Rather, the District Court, in conformity with decisions from the other circuits in the area of ineffective assistance of counsel, correctly found on this record, that counsel was not required to make a further investigation of possible mental health mitigation or the clients competency when this seemingly unimpaired defendant knowingly decided to present no mitigation evidence and demand the death sentence if he was found guilty. The Court quoted from the holdings of cases from other circuits in making this holding. Autry v. McKaskle, 727 F.2d 358, 362 (5th Cir.), cert. denied, 465 U.S. 1085 (1984) (If a defendant knowingly makes the choice not to present evidence in mitigation and request death, counsel was ethically bound to follow the client's wishes); Felde v. Blackburn, 795 F.2d 400 (5th Cir. 1986)

Lawson seeks to re-cast the District Court's decision as one in which the Court has permitted a finding of effective counsel where there was no investigation of the mental health of an obviously severely impaired client simply because he announced he desired the death penalty. The facts before the District Court in this case do not support this scenario.

It is undisputed that counsel ought not "blindly follow" the directives of an obviously impaired client. Rather, counsel has a duty to make a sufficient investigation of potential avenues of defense so that counsel may advise the client so that any subsequent decision by the client is a knowing one. Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986), cert. denied, 481 U.S. 1042 (1987); Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991); Martin v. Maggio, 711 F.2d 1273 (5th Cir. 1983), cert. denied, 469 U.S. 1028 (1984). Counsel should follow up those avenues of potential mitigation a client has not directly foreclosed. Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991) and counsel has expanded duties in the investigation of a case where counsel knows that a client is seriously impaired and cannot exercise proper judgment. Thompson v. Wainwright, 787 F.2d at 1451. However, when a rational client forecloses an area of investigation, he cannot later claim his lawyer was ineffective for following his express directive. Jeffries v. Blodgett, 988 F.2d 923 (9th Cir. 1993); Mitchell v. Kemp, 762 F.2d 886 (11th Cir. 1985), cert. denied, 483 U.S. 1026 (1987).

Counsel here did not "blindly follow" the directives of a person they thought to be impaired. Rather, the well developed record from the state court[1], as supplemented by the Dorothea Dix

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[1] Lawson asserts that there has been no evidentiary hearing on his claim that he was rendered ineffective assistance of counsel

Footnote continued on next page.

report in federal court, shows that counsel made an adequate mental health investigation prior to Lawson determining he desired not to present mitigating evidence. The record does not support a finding that counsel had reason to believe their client was irrational or seriously impaired or that either of the statutory mitigating factors set out in the statute was available in this case.

In arguing that Lawson's counsel knew Lawson was impaired and should have investigated his mental status for presentation of possible mitigating evidence, Lawson directed this Court's attention to the Motion and subsequent Order for a Competency Hearing filed in this case in late January, 1981. He also draws attention to an affidavit first presented in federal court by a Dr. Billy Royal dated January 27, 1989, some eight and one half years after the trial of this case in which Dr. Royal opined, based on several interviews with Lawson, a review of his Dorothea Dix Competency Evaluation, several witness interviews and his own

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Footnote continued from previous page.

by their not investigating or presenting evidence of Lawson's alleged mental difficulties to the sentencing jury. While it is true this exact claim was first raised in federal court, Lawson had raised two related claims in state court which required the development of most of the evidence necessary to decide this claim. Lawson in state court raised a claim of ineffective assistance of counsel for failing to present mitigating evidence and a claim that the presentation of no evidence in mitigation deprived Lawson of a reliable sentencing hearing. Thus, the bulk of the factual underpinnings for the present matter were of necessity litigated in state court.

belief that to request death is bizarre, that Lawson was seriously impaired, indeed incompetent, at the time of his trial and that Lawson's drug use and mental condition in 1980-81 could provide the basis for finding the presence of the two statutory mitigating factors dealing with impairment and that the murder was committed while the defendant was under a mental or emotional disturbance. See N.C.Gen.Stat. §15A-2000(f)(2) and (f)(6) (1988). Lawson also points to his demand that he receive the death penalty and his requesting his counsel not to speak to his parents and relatives as proof that he was impaired and that counsel should have known to investigate his mental status. Finally, he points to selected portions of the Dorothea Dix records as proof of impairment of which counsel should have been aware. This evidence, when read with the uncontradicted evidence from the state court, the state court records, and the taped conversation between Lawson and his lawyer, fails to make such a showing and casts no doubt on the appropriateness of the lawyer's actions in not requesting further mental health assistance in 1981 after Lawson decided that if he was found guilty he desired not to present mitigating evidence at his sentencing hearing and would request the death penalty.

The uncontradicted evidence from the State Motion for Appropriate Relief hearing revealed that Mr. Johnson[2] moved for a competency hearing for Lawson immediately upon getting into the case. The Motion for this review was co-signed by Lawson himself. (Respondent's Appendix A, 1) In this pre-Ake[3] era this use of a competency evaluation was often used by lawyers to determine if any significant mental mitigation might be available. See Smith v. Dixon, 766 F.Supp. 1370, 1393-94 (E.D.N.C. 1991), aff'd, 996 F.2d 667 (4th Cir. 1993), rev'd on another issue, ___ F.2d ___ (4th Cir., Jan. 21, 1994)(en banc). The Order subsequently signed by a District Court judge shows on its face that it was prepared by the law firm and merely recites the language of N.C.Gen.Stat. 15A-1002 (1988) necessary to get such an evaluation. (Respondent's Appendix A, 2-3) The allegations in the Motion and the findings in the Order are further set in perspective when reviewed in light of counsel's testimony concerning this matter. At the time of the evaluation, according to Mr. Johnson, Lawson asked Johnson if he thought he were crazy. Johnson testified that he stated no, that he wanted to make certain that Lawson got help if there was any mental problem. They went over what Lawson should expect while at

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2 Lawson mistakenly recites that prior counsel had made the request for the competency hearing. The State records show otherwise. (Respondent's Appendix A, 1-3)

3 Ake v. Oklahoma, 470 U.S. 68 (1985)

Dorothea Dix Hospital for the evaluation and that Lawson needed to be careful talking about the facts of the crime itself. When the competency report came back, Johnson went over the report with Lawson. (Respondent's Appendix D, 13-14)

Lawson, in speaking to Johnson about his background in the months prior to his trial and sentencing hearing, never indicated that he thought he had any type of mental or emotional problem or, apparently, had ever been treated for one. Lawson also told Johnson he did not use drugs and had not used them to excess in the past. Mr. Johnson formed an opinion over the months that he worked with Lawson that Lawson was well read and highly intellectual. He never had any problem working with Lawson. In fact, Mr. Johnson found that in terms of Lawson's mental processes and his practice of reason and logic, that Lawson was one of the best clients he had ever represented. (Respondent's Appendix D, 7-15)

Lawson told Mr. Johnson that he committed the crimes with which he was charged. He told him that he committed breaking and enterings to supplement his income as a logger, that break-ins were part of his profession. He did not tell him the murder and attempted murder occurred under stress. Rather, he explained that he killed Wayne Shinn and tried to murder Buren Shinn in order to eliminate witnesses so he would not have to go to prison when he was observed by the Shinns during his break in at the younger Shinn's home. He described in chilling detail his

thought process in determining to kill the two men, both of whom he shot in the back of the head even after they begged for their lives. He had no remorse over killing them, only that one of them lived to identify him. (Respondent's Appendix D, 19-26, 52-57)

Lawson also told Mr. Johnson that he was not in close contact with his relatives, including his mother, who lived in Michigan and had not been close or in contact with them for a number of years. Based on this lack of contact, Lawson did not desire his family involved in this case. Johnson considered contacting the family anyway, but determined any mitigating value would be off-set by a showing that they had not been in contact for years. (Respondent's Appendix D, 4-6, 31-32)

Johnson made his own investigation among people in Cabarrus County and Stanly County who knew Lawson. He spoke to the Stanly County deputies where Lawson had been caught and imprisoned for a series of house breakings. The information that Johnson received from people in Lawson's circle of acquaintances was that Lawson was a loner, somewhat of a braggart, and was known as a robber and thief and someone who would handle "hot" goods. Lawson's girlfriend was somewhat unstable and had already lied in the news paper in order to try to provide Lawson an alibi. Mr. Johnson considered her an inappropriate witness due to the danger of cross-examination. (Respondent's Appendix D, 8-10, 25-26)

The competency report that Johnson received from Dorothea Dix Hospital showed the forensic psychiatrist, Dr. Groce, determined that Lawson was competent and suffered from "an adjustment disorder with depressed features." The report noted that on admission Lawson was cooperative and alert. He required no medication and was given no medication upon leaving the hospital. His stream of mental activity was normal. He denied hallucinations or delusions when he spoke to the psychiatrist. He reported previous suicidal thoughts and one attempt when a girlfriend broke up with him. He denied any present suicidal thoughts. His memory, judgment, and intellect all appeared within average limits. The psychological testing showed an I.Q. of 107 and a reading ability of ninth grade or over. His Bender-Gestalt testing did not suggest serious organicity, so there was no basis to believe he had any organic brain dysfunction. His projective drawings

> suggest significant psychopathology including a low self-esteem with feeling of inferiority, insecurity, and inadequacy. Mr. Lawson's MMPI profile suggest anxiety, depression and nervousness in a patient who is likely to accentuate his complaints by being self-dramatic. He may be expected to be chronically hostile and resentful and to use projection and acting out as preferred defense mechanisms. Impulse control is likely to be deficient. Expression of hostility and depression often form a cyclic pattern. Such patients are typically self-centered and dependent with an exaggerated need for affection.

(Respondent's Appendix C, 1-2)

This report does not give rise to a belief that Lawson is irrational. It reports no psychosis or serious impairment. It does not suggest the presence of mental health mitigation in a witness elimination murder. Thus, the evidence before the lawyers at the time that Lawson determined he desired the death penalty and not to present mitigation, failed to suggest either that Lawson had serious mental problems as opposed merely to an unsuccessful personality or that further examination of Lawson's mental status would be beneficial. Lawson and his attorneys obviously talked about the mental health mitigating circumstances set out in North Carolina's capital punishment statute. In the taped conversation between Lawson and one of his lawyers, they talk about the presentation of evidence that "you were emotionally upset or mentally wrong, whatever. We don't have any of those circumstances in this particular case." (Respondent's Appendix D, 35)

Thus, the record shows counsel already had investigated the possibility of helpful mental health material through the use of a competency hearing. This evaluation showed a rational, oriented, and intelligent man who was not adjusting well to incarceration and was depressed but who needed no medication for any of his problems. Counsel went over the competency report with Lawson so he was aware of what could have been presented about his personality deficiencies when he decided not to present mitigating evidence. Certainly his explanation of how the crimes

occurred foreclosed any further investigation into the issue of mental impairment or emotional distress during the crime. Under these circumstances, Lawson's tactical decision was a knowing one. His counsel were not ineffective for failing to demand a further competency evaluation for Lawson prior to acceding to his demand or doing yet further investigation into the area of his mental health since what they knew suggested little likelihood of finding any significant mitigating evidence. King v. Lynaugh, 868 F.2d 1400, 1403-05 (5th Cir.), cert. denied, 489 U.S. 1099 (1989); Byrne v. Butler, 845 F.2d 501 (5th Cir.), cert. denied, 487 U.S. 1242 (1988); Felde v. Blackburn, 795 F.2d 400 (5th Cir. 1988) (Counsel may have been incompetent in failing to obtain a further psychological evaluation for Felde where their defense at the trial was insanity, suggesting they had a reasonable basis to believe the decision to ask for the death penalty was not the act of a rational person). The decision by Lawson to request death was not "mere jailhouse bravado" or the sudden whim of a desperately despondent person of the type condemned in Martin v. Maggio, 711 F.2d at 1280 and Blanco v. Singletary, 943 F.2d at 1502. Rather, this tactical determination was made over a period of months. As Mr. Johnson testified and as the taped conversation reveals, it is the carefully thought out decision of an intelligent and rational man who did not wish to live in prison, a man who preferred "quality" to "quantity" in life. (Respondent's Appendix D, 38-40, 46-49) The decision to take

this step was made after reviewing possible mitigation options and after he had foreclosed the need for further investigation of his mental health or the statutory mitigating circumstances dealing with impairment or emotional disturbance by explaining how deliberate the murder and murder attempt was and that he was not using drugs at the time. The competency evaluation showed no serious mental problem and counsel's own observations suggested to counsel no deficiencies in Lawson's intellect or thought processes.

This Court should give little credence to the remote-in-time affidavit of Dr. Royal concerning Lawson's mental state and the availability of mitigating evidence in considering whether counsel acted reasonably. The State suggests that Royal's findings can best be characterized as an example of the fact that "unfortunately, in today's society, experts can be found to render 'scientific' opinions on either side of any question." Knott v. Mabry, 671 F.2d 1208, 1212 (8th Cir. 1982) and that "affidavits like these are not uncommon, especially in capital cases. They are an unfortunate though understandable occurrence. It seems that when a prisoner's life is at stake, he often can find someone new to vouch for him. Experience has shown, however, that such affidavits are to be treated with a fair degree of skepticism." Herrera v. Collins, ___ U.S. ___, ____, 113 S.Ct. 853, 872 (1993) (O'Connor, J., concurring). Moreover, despite what Dr. Royal now opines, what was available in 1981 to

the lawyers is far different. As noted, the lawyers were dealing with a man found competent, who acted rationally and who appeared intelligent and stayed involved with his attorneys in trying to win the case at the guilt stage of the trial.

In this case, there was no evidence of counsel failing to do any investigation at all, but rather eagerly latching on to the comments of a noticeably morose and irrational client. Blanco v. Singletary, 943 F.2d at 1502; Martin v. Maggio, 711 F.2d at 1280. Likewise, counsel here had no reason to believe their client retarded or experiencing serious mental difficulties as was true in Thompson v. Wainwright, 787 F.2d at 1451 and Kenley v. Armontrout, 937 F.2d at 1306-09. Counsel here followed up on all reasonable lines of investigation, including investigation of mental health evidence, not specifically foreclosed by their client prior to the client's announcement that he did not desire any presentation of mitigating evidence and that he desired the death penalty. Thus, this case does not conflict with the holdings of Kenley v. Armontrout, 937 F.2d at 1306; Gray v. Lucas, 677 F.2d 1086, 1093-94 (5th Cir. 1982), cert. denied, 461 U.S. 910 (1983) (A client's desire not to use character witnesses does not foreclose, but does limit, counsel's duty to investigate) or Thomas v. Kemp, 796 F.2d 1322, 1324 (11th Cir. 1986) (Statement that he did not wish witnesses to cry for him not a waiver of character witnesses). In short, the cases cited by Lawson do not conflict with the District Court's holding in

this case, but rather, are fully in harmony with the decision of the District Court. There is no conflict among the circuits and no reason to grant certiorari to review this rather pedestrian issue involving a claim of ineffective assistance of counsel.

II. THE INSTRUCTIONS GIVEN IN LAWSON'S CASE ARE NOT VIOLATIVE OF MILLS V. MARYLAND, 486 U.S. 367 (1988) OR MCKOY V. NORTH CAROLINA, 494 U.S. 433 (1990), EVEN ASSUMING RETROACTIVE APPLICATION OF MILLS AND MCKOY TO CASES FINAL WHEN THOSE OPINIONS ARE ANNOUNCED.

As the second basis for demanding that certiorari issue, Lawson claims that the penalty phase instructions given in this case violated Mills v. Maryland, 486 U.S. 367 (1988) and McKoy v. North Carolina, 494 U.S. 433 (1990) by implicitly requiring jury unanimity as to the finding of mitigating circumstances, even though neither the instructions nor the verdict form mentioned a unanimity requirement to find mitigation and even though no written findings as to the presence or absence of any particular mitigating circumstances were required by the instructions or verdict form. Lawson asserts not only that this case, but all other cases determined by the Fourth Circuit not to be infected with Mills/McKoy error are erroneously decided and are in serious conflict with the decisions in other circuits. He asserts this Court should use this case to resolve the alleged split among the circuits and other courts on this issue. However, the Fourth Circuit has not ruled erroneously on this issue, there is no

substantial split of authority concerning the scope of Mills and McKoy and this case certainly is an improper vehicle to use to resolve any such differences on this matter.

This case was final as of May 20, 1985, well before the announcement of the new rule in Mills. Lawson v. North Carolina, 471 U.S. 1120 (1985). Since Mills and McKoy announced new rules of law and do not represent watershed rules within the second exception explained in Teague v. Lane, 489 U.S. 288 (1989), these cases are not retroactive to cases which were final when the decisions were announced. Wilcher v. Hargett, 978 F.2d 872 (5th Cir. 1992) (Mills/McKoy announce new rules and are not within the second exception to the Teague non-retroactivity doctrine as to final cases); Cordova v. Collins, 953 F.2d 167 (5th Cir. 1992); Zettlemoyer v. Fulcomer, 923 F.2d 284, 306 (3rd Cir. 1991)(Sloviter, J., concurring); Thomas v. Jones, 742 F.Supp. 598 (S.D. Ala.), aff'd, ___ F.2d ___ (unpublished), stay and cert. denied, ___ U.S. ___, 111 S.Ct. 1 (1990); but see Williams v. Dixon, 961 F.2d 448 (4th Cir.), cert. denied, ___ U.S. ___, 113 S.Ct. 510 (1992) Thus, the final nature of this case makes it an inappropriate vehicle for a certiorari grant to resolve the reach of any cases concerning Mills or McKoy.

Lawson argues that because the State did not raise Teague as a defense in its original answer to the habeas petition in the District Court, the State is foreclosed from doing so before this court. Lawson's assertion is feckless. The State moved to

amend its answer in the District Court to raise a Teague defense and was permitted to do so by the District Court well prior to the District Court's ruling on the Mills/McKoy issue. The District Court relied in part on the non-retroactivity of Mills and McKoy in for denying relief on this issue. Alternatively, the District Court found the instructions uninfected by Mills/McKoy error. On appeal to the Fourth Circuit, Lawson complained that the District Court had abused its discretion in permitting the State to amend its answer to allege non-retroactivity. The State responded the amendment did not constitute an abuse of discretion. The Fourth Circuit, however, consistent with its prior panel decision in Williams v. Dixon finding Mills to be retroactive, dealt only with the merits of the claim, finding no Mills/McKoy error. Thus, the State raised this defense in a timely manner in the District Court and discussed it in the Fourth Circuit as well. More importantly, as Schiro v. Farley, ___ U.S. ___, No. 92-7549 (1994) makes clear, the State, as respondent, is entitled to rely on any legal argument in support of the judgment below. Where, as here, the State is raising this defense in its brief in opposition, the State has not waived its right to rely on the doctrine of Teague non-retroactivity before this Court.

Even assuming retroactivity of Mills and McKoy to cases final when these decisions were announced, this case is not infected with Mills/McKoy error. In this case, the jury was

instructed that it had to be unanimous to find the existence of the aggravating circumstances proffered, that it had to be unanimous to find that the aggravating circumstances were sufficiently substantial to warrant imposition of the death penalty, and that the jurors had to be unanimous in finding that the aggravating circumstances outweighed any mitigating circumstances found. By contrast, the jury was not instructed, and the verdict sheet did not require the jury to find the presence of any proffered mitigating circumstances unanimously. (Respondent's Appendix E, 11-14; Appendix F, 2) The Judge instructed the jurors peremptorily that they all must find the existence of certain uncontested matters in mitigation. (Respondent's Appendix E, 13-14) However, they were not required to answer "yes" or "no" on the verdict sheet after each item in mitigation. Indeed, the jurors were not required by the instructions or the verdict sheet to make any specific findings as to mitigation on the verdict sheet except to answer generally that some mitigation was found or not found to exist. (Respondent's Appendix E, 11; Appendix F, 2) There was no general overarching unanimity charge given that all issues must be found unanimously. Rather, the Court only required unanimity as to the three other sentencing issues, not the issue dealing with the finding of mitigation. (Respondent's Appendix E, 6).

Mills and McKoy both dealt with instructions which explicitly required unanimity in the finding of mitigating

circumstances. Here, by contrast, the capital sentencing instructions did not explicitly require the finding of individual mitigating circumstances unanimously and, indeed, did not require any written findings answering "yes" or "no" concerning the existence or non-existence of the individual mitigating circumstances at all. This is in stark contrast to the required unanimity as to the existence or non-existence of matters in aggravation, as well as the other two sentencing questions. In Maynard v. Dixon, 943 F.2d 407, 418-420 (4th Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1211 (1992), the Fourth Circuit, in an opinion authored by Circuit Judge Dixon Phillips, held the instructions in Maynard not to raise Mills/McKoy concerns. Circuit Judge Phillips wrote:

> We think a plain reading of the verdict form and the jury instructions indicates that the jury was not given the impression that its conclusions on mitigating circumstances must be unanimous. For one, the word "unanimously" is conspicuously absent from the verdict form question on mitigating circumstances. Equally important, the court's instructions in mitigating circumstances conspicuously lack any mention that the jury must "agree unanimously."

943 F.2d at 419.

This reasoning is equally applicable to the present case before the Court. Given the express use of unanimity in instructing on some of the issues, its absence would surely be significant to the jurors when determining how to view the

mitigating evidence. Thus, there is no reasonable likelihood that a juror might have understood he or she was precluded from considering a mitigating circumstance unless the factor unanimously was agreed upon by all twelve jurors. See Boyde v. California, 494 U.S. 370, 380 (1990) ("Although a defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction, a capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a possibility of such an inhibition.")(emphasis added). Under the Boyde standard, the instructions given in this case fail to show error pursuant to Mills or McKoy.

Lawson cites this Court to a study of mock jurors conducted by a social scientist as proof that jurors would have understood the instructions in this case to impute a unanimity requirement. However, such studies are irrelevant to this legal question. McDougall v. Dixon, 921 F.2d 518, 532-33 (4th Cir. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 2840 (1991); Jeffries v. Blodgett, 988 F.2d 923 (9th Cir. 1993). Indeed, a panel of the Fourth Circuit held that same instructions which were the subject of the Luginbuhl study did not violate the Mills/McKoy rule since the "jury was not instructed that its findings on mitigation must be unanimous." McDougall v. Dixon, 921 F.2d at 539. McDougall was executed in 1991, after this Court denied certiorari review. McDougall v. North Carolina, ___ U.S. ___, 111 S.Ct. 2840 (1991). If the sentencing instructions in McDougall were distinguishable

from Mills and McKoy sufficiently to permit execution in that case, then the Luginbuhl study ought have even less persuasive force in this matter where, as noted, the jurors were not even instructed to make written findings as to the presence or absence of particular mitigating circumstances.

Lawson's citation to Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992), and Kubat v. Thieret, 867 F.2d 351 (7th Cir. 1989), cert. denied sub nom., Kubat v. Greer, 493 U.S. 874 (1989), as well as the two state cases do not manifest a serious conflict among the circuits on this issue. In Kubat, the Illinois trial court's instructions required unanimous agreement as to the sufficiency of the mitigating factors to preclude a death sentence. That challenged instruction raises an issue which is not the same as whether or not a juror would understand silent instructions on determining the existence of mitigating circumstance to impute a unanimity requirement. Likewise, in Mak v. Blodgett, supra, the issue addressed in passing by the Ninth Circuit concerned whether the state court's prior jury instructions and verdict form, which required a unanimous verdict, both for death or life, erroneously encouraged the jury to vote for the death penalty. In particular, one of the challenged instructions misstated the law by informing the jury that it had to be unanimous before they could answer "yes" to the question whether there were sufficient mitigating circumstances to warrant leniency. The Ninth Circuit noted the instructions combined to improperly emphasize to the

jury that unanimous agreement was required not to impose the death penalty. Mak v. Blodgett, 970 F.2d at 625. Neither Mak not Kubat concern whether sentencing instructions similar to the ones now before this court might reasonably be interpreted to require unanimity in finding the presence of the mitigating circumstances. Mak does not set up a significant split in the circuits for yet another reason. As the Ninth Circuit acknowledged, since the trial in Mak, Washington State revised its sentencing instructions so the claimed error in Mak cannot affect many pending cases in Washington state. The determination of the issue was not necessary to the determination in Mak since the case was going back for a new sentencing hearing based on the issue of ineffective assistance of counsel.

The two state cases cited also do not set up a significant conflict among the Fourth Circuit and other courts. In Engberg v. Meyer, 820 P.2d 70 (Wyom. 1991), a closely divided court "articulating dictum in a case in which by the majority's own admission, 'we need not decide' the issue, and relying upon a dissenting opinion" held that the instructions on mitigation given in that case might have imputed a unanimity requirement into the sentencing instructions. Engberg v. Meyer, 820 P.2d at 168 (Thomas, J, and Brown, C.J., dissenting) However, Wyoming had changed its instructions to be explicit as to the finding and rejection of mitigation. Thus, Engberg, which had been reversed on another penalty phase issue, represents only dictum as regards

the Mills/McKoy issue and impacts, at most, one other case in Wyoming. In State v. Brantley, 427 S.E.2d 758 (Ga. 1993), the Georgia Supreme Court held that instructions which required the jury to write out and have the jury foreman sign all mitigating factors found by the jury implicated Mills/McKoy concerns. Those instructions are too dissimilar to the instructions given in Lawson to constitute a serious split of authority. Moreover, in Georgia it is not necessary that jurors list the mitigation found and in most cases this type of listing is not required. Thus, the Court's holding in Brantley will not impact any other cases now pending in Georgia since its standard instructions do not require the jurors to make such findings.

The conflicts among the circuits, then, identified by Lawson, are not serious or on-going. The identified differences do not require the grant of certiorari to resolve the issues. The decisions of the Fourth Circuit generally and in this case particularly are in harmony with the decisions rendered in the other circuits on this precise claim. Lawson v. Dixon, 3 F.3d at 754; McDougall v. Dixon, supra; Gardner v. Dixon, 966 F.2d 1442 (4th Cir. 1992)(unpublished), cert. denied, ___ U.S. ___, 113 S.Ct. 396 (1992); Gardner v. Dixon, 979 F.2d 847, No. 92-4013 (4th Cir. 1992), cert. denied, ___ U.S. ___, 113 S.Ct. 396 (1992); Maynard v. Dixon, 943 F.2d 407 (4th Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1211 (1992); Zettlemoyer v. Fulcomer, 923 F.2d 284, 306-08 (3rd Cir. 1991), cert. denied, ___

U.S. ___, 112 S.Ct. 624 (1991); Kordenbrock v. Scroggy, 680 F.Supp 867, 892-93 (E.D. Ky. 1988), aff'd, 889 F.2d 69 (6th Cir. 1989), vacated and rehearing en banc granted, 896 F.2d 1457 (6th Cir. 1990), rev'd on other grounds, 919 F.2d 1091 (6th Cir. 1990)(en banc) (Nine of the thirteen judges of the active 6th Circuit agreed the instructions given in Kordenbrock did not implicate Mills/McKoy error: 919 F.2d 1110, 1120-21), cert. denied, ___ U.S. ___, 111 S.Ct. 1608 (1991); James v. Whitley, 926 F.2d 1433, 1446-48 (5th Cir. 1992). Thus, the decision in Lawson is in conformity, not conflict, with the majority of other courts which have adjudicated this issue. There is no need to take this case since it does not raise an important issue with any significant conflict among the circuits.

Finally, even assuming the instructions in this case imputed unanimity, any error is harmless. Lawson cannot demonstrate that any such error "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 113 S.Ct. 1710, 1722 (1993). In this case the mitigating evidence presented was de minimus. The Supreme Court of North Carolina, in a unanimous opinion, noted "defendant offered little in mitigation of the murder." State v. Lawson, 314 S.E.2d 493, 503 (N.C. 1984). The trial judge peremptorily instructed the jurors they must give effect to the identified statutory mitigating circumstances. The other circumstances Lawson now attempts to wring from the guilt phase evidence are so mundane as to be of no

worth whatsoever. The identified evidence at most shows that Lawson, when he desired to do so, behaved in a normal fashion. This paucity of evidence, when arrayed against Lawson's execution style slaying of Wayne Shinn and the attempted murder of Buren Shinn, and his arrogant demand for the death penalty, supports a harmlessness finding beyond a reasonable doubt, much less within the harmlessness standard set out in Brecht.

In sum, the instructions in this case do not violate the dictates of Mills or McKoy. Further, there is no significant conflict among the courts on the scope of Mills and McKoy and any variations at all do not raise an important question which requires this Court to grant certiorari in this case to resolve the issue.

III. THE FOURTH CIRCUIT PROPERLY HELD LAWSON UNENTITLED TO A FURTHER EVIDENTIARY HEARING IN FEDERAL COURT CONCERNING WHETHER HE KNOWINGLY AND VOLUNTARILY WAIVED HIS RIGHT TO PRESENT EVIDENCE IN MITIGATION DURING HIS SENTENCING HEARING.

As the third basis for asserting that this Court should issue its writ, Lawson apparently asserts that the Fourth Circuit, in affirming the unpublished opinion of the District Court, erroneously held a defendant had the right to waive the presentation of mitigating evidence in a sentencing phase hearing. He also apparently asserts that the in-court hearing during the sentencing hearing was insufficient to show a knowing

and voluntary waiver. Finally, he asserts the Fourth Circuit, employing an inappropriately high evidentiary standard, improperly denied him an evidentiary hearing in federal court on whether or not he knowingly and voluntarily waived his rights to a "reliable" sentencing hearing, assuming he had the right to restrict the presentation of mitigating evidence. Lawson asserts this holding places the Fourth Circuit at odds with the other circuits on the standard a petitioner must show to be permitted an evidentiary hearing on his claims. Lawson is mistaken. There is no real split of authority among the circuits concerning the right of a rational defendant to order counsel not to present mitigation and to demand the death penalty. A further evidentiary hearing in this matter was not denied due to the improper use of an overly burdensome standard, but rather because the record already was fully developed on the relevant aspects of the claim.

In this matter, Lawson, after consultation with his attorneys over an extended period of time, and after having the sentencing proceedings and his right to present mitigation evidence explained to him, determined he preferred the death sentence to life imprisonment. Accordingly, at his sentencing hearing, before the judge but out of the presence of the jury, Lawson was sworn and then questioned by counsel in front of the Court concerning this decision. Mr. Lawson acknowledged he had a G.E.D. diploma and that he read a great deal. He acknowledged

that he had discussed this issue with his counsel on at least five or more occasions at great length, that his lawyer had explained the function of aggravating and mitigating circumstances, and specifically told him that it was in Lawson's benefit for the jury to consider mitigating circumstances, and that the jury then had the duty of determining whether to give life or death. Lawson acknowledged that his counsel had never failed to answer any question he had about the sentencing proceeding. Lawson then read aloud and swore to the following paper writing:

> I, David Lawson, acknowledge that I am on trial for the murder of Wayne Shinn and the shooting of his father, Buren Shinn, along with the breaking and entering of Wayne Shinn's home on December 4, 1980. I realize that the State of North Carolina is seeking the death penalty. I have spoke with my attorney James C. Johnson, Jr., on at least five separate occasions and told him that should I be found guilty, then in the second trial dealing with punishment, I wish to have my attorney seek and request the death penalty. I do not wish to spend the rest of my life in jail. I had rather have the death penalty that a life term. I understand my right to a second trial in which the jury will consider both mitigating and aggravating circumstances. I have, nevertheless, for some months before the trial told my attorney I do not want a life sentence, but a death sentence and I want him to take such legal steps as may be necessary to see that the sentence is carried out.

(Respondent's Appendix B, 1)

At counsel's request the Judge then inquired of Lawson if that were indeed his wish and reminded him of his absolute right

to testify and to offer evidence at this stage of the trial and that the jury would nevertheless weigh both aggravating and mitigating evidence present from the record. The Court further inquired if Lawson understood the things the Court had said. Lawson acknowledged he did. He then swore to the document which he had read in open court and signed and further acknowledged that the paper writing is true, correct and expressed Lawson's desire in regard to sentencing.

The jury then returned to the courtroom and Lawson took the stand. Lawson then told the sentencing jury he desired the death penalty. Mr. Johnson extracted some evidence in mitigation from Lawson for the jury's consideration including his insubstantial criminal record, and that he had assisted the authorities in a past case. The State briefly cross-examined Lawson on some guilt phase issues. Mr. Johnson, contrary to Lawson's wishes, argued that Lawson should receive a life sentence. The jury, after a little over a half hour, returned a binding recommendation that Lawson be sentenced to death. (Respondent's Appendix E, 17)

Lawson now apparently suggests that his action in demanding the death sentence and limiting his counsel in the presentation of mitigating evidence is invalid since it is against public policy to permit a defendant to forego the presentation of mitigating evidence. Neither this Court or any of the other circuits have held a competent defendant is precluded from determining not to put on mitigating evidence or to request the

death sentence. King v. Lynaugh, 868 F.2d 1400 (5th Cir. 1989), cert. denied, 489 U.S. 1099 (1989); Byrne v. Butler, 845 F.2d 501 (5th Cir.), cert. denied, 487 U.S. 1242 (1988); Autry v. McKaskle, 727 F.2d 358 (5th Cir.), cert. denied, 465 U.S. 1085 (1984); Mitchell v. Kemp, 762 F.2d 886 (11th Cir. 1985); Jeffries v. Blodgett, 988 F.2d 923 (9th Cir. 1993). Thus, the decision of the Fourth Circuit is in conformity with the other circuits in affirming a finding that the right to forego the presentation of evidence or to demand the death penalty remains the right of a rational defendant to choose.

The in-court examination under oath of Lawson by counsel and the trial judge together with the sworn statement signed and acknowledged by Lawson as representing his desire more than satisfies any explicit on-the-record waiver requirements this Court or any of the circuit courts have required in similar circumstances.

Voluntariness for purposes of a guilty plea is satisfied when a prisoner has adequate notice of the offense and the constitutional protections he is waiving. Henderson v. Morgan, 426 U.S. 637 (1976) Here, the in-court dialogue between the judge and Lawson and Lawson and his attorney shows he knew the sentencing possibilities and also of his right to present mitigating evidence to be weighed against any aggravating circumstances. He acknowledged that his counsel had tried to dissuade him from the course he was taking and that counsel had

answered all questions asked concerning the procedure. Thus, the in-court inquiry by the Judge and counsel was sufficient to protect Lawson's rights and is largely comparable to the type inquiry other circuit courts have found sufficient. See King v. Lynaugh, 868 F.2d at 1404.

Lawson's main assertion on this issue is that the Fourth Circuit improperly denied Lawson a right to have an evidentiary hearing in the federal courts on his contention that any waiver of his right to what he characterizes as a "reliable" sentencing hearing was not intelligent and voluntary. Lawson suggests that the Fourth Circuit improperly used the standard for determining the need for an evidentiary hearing in habeas review on alleged lack of competence to be tried set out in Card v. Dugger, 911 F.2d 1494, 1519-20 (11th Cir. 1990) and Fallada v. Dugger, 819 F.2d 1564 (11th Cir. 1987) to determine whether an evidentiary hearing was necessary in federal court to resolve the issue of whether the waiver by Lawson of his right to present mitigating evidence was voluntary and intelligent. Lawson misreads the opinion of the courts below and ignores the basis upon which he made the assertion of no knowing waiver in his habeas petition.

Lawson asserted in his habeas petition that due to his alleged incompetency and the misinformation supposedly given him by his attorneys on parole eligibility, he did not knowingly and voluntarily waive his right to present mitigation. Since he premised a major part of his claim of a non-knowing waiver on his

alleged incompetency, the Card/ Fallada standard obviously was appropriate to deal with that part of the claimed need for an evidentiary hearing. The test for competency to stand trial and knowingly to waive other constitutional rights is the same. Godinez v. Moran, 509 U.S. ___, 113 S.Ct. 2680 (1993). Since the competency standard is the same for a knowing waiver of known constitutional rights and to stand trial, Lawson cannot argue that the Court may hold him to the Card standard to prove entitlement to an evidentiary hearing on competency to stand trial, but that another test should be used to determine whether to have an evidentiary hearing on whether his alleged mental incompetency made his purported waiver non-voluntary. Thus, as to allegation that he did not knowingly and voluntarily waive his right to present evidence due to incompetency, the Card standard was the proper standard to use to determine the need for a further evidentiary hearing.

Lawson premised the other part of his claim to a non-knowing waiver on allegedly improper advice given him by his attorneys that he would have to serve 180 years before becoming eligible for parole. However, the basis for the last-stated part of this claim was already in evidence from the state court evidentiary hearing. Thus, but for the overarching claim of incompetency, the other material upon which this claim was grounded had been fully developed in state court. The standard used to determine the need for an evidentiary hearing as to this material is

whether the record, viewing the evidence in the light most favorable to Lawson, shows there is no genuine issue of material fact which would have warranted an evidentiary hearing. Blackledge v. Allison, 431 U.S. 63, 80 (1977). In this case, the record does not show a genuine issue of material fact which warrants an evidentiary hearing on the voluntariness of the waiver of right to present mitigating evidence.

The trial transcript, the uncontradicted evidence from trial counsel at the Motion for Appropriate Relief hearing, as well as the taped conversation between Lawson and his trial attorney introduced during the Motion for Appropriate Relief hearing show Lawson's decision to request death if the jury thought he was guilty was an informed choice by a rational person and was not based on misinformation given Lawson by his attorneys about parole eligibility. Both trial counsel explained the meaning and nature of aggravating and mitigating factors and gave Lawson copies of the relevant portions of the capital sentencing statute to study. Counsel explained the balancing proceedings to Lawson and had repeated conversations with him to attempt to dissuade Lawson from demanding the death penalty. The state court finding on this issue, entitled to a presumption of correctness, is that the attorneys "did fully advise the defendant concerning the elements of the offenses, the maximum punishment that could be imposed, and the aggravating and mitigating factors involved in the sentencing process"

The taped conversation made between Lawson and one of his lawyers prior to trial which was introduced into evidence during the Motion for Appropriate Relief proceeding, the uncontradicted testimony of James C. Johnson at that hearing, and the sentencing colloquy itself negated any need for an evidentiary hearing on whether or not Lawson fully understood the nature of a sentencing hearing or had been misinformed about parole.

The taped conversation shows that Mr. Johnson did not tell Lawson he would have to serve 180 years before he would be eligible for parole. Rather, he told him the whole group of charges Lawson faced would "max at about 180-some odd years. . . that is, if you were given a life-plus-plus on the sentence." (Respondent's Appendix D, 35-36) This is not a misleading approximation. In 1981 the maximum sentence for an aggravated assault was 20 years, N.C.Gen.Stat. §14-32(a), a breaking and entering, 10 years, N.C.Gen.Stat. §14-54 (1979), and a life sentence, while indeterminate, was considered approximately 100 years for the purposes of parole eligibility. N.C.Gen.Stat. §15A-1371(c)(1978) (A prisoner serving a life sentence becomes eligible for parole after 20 years, which is considered 1/5 of the maximum permitted by law for the offense). The parole eligibility under these charges would be around thirty years.

Lawson subsequently talked on the tape about the lack of quality of life in prison and Mr. Johnson stated. "Well I can understand with no chance of parole..." and Lawson interjected

"one hundred and eighty years? I doubt if I outlive it." (Respondent's Appendix D, 39) This quotation, standing alone, might have supported Lawson's factual assertion that he made his sentencing decision due to misinformation about parole. However, later in the same conversation, Lawson clarified that he understood that his possible parole eligibility was not 180 years, but rather, approximately thirty. He states:

> But what can you look forward to? Getting out in 30 years, old man? I'm in the prime of my life. I mean I talked to some people about it. They saying 'well you know don't ever give up.' Thirty years? I know people that have a family and got what they wanted when they got out after they spent all this time, you know, but I just don't think I would want to.

(Respondent's Appendix D, 48) This quotation clearly indicates that Lawson was unwilling to spend thirty years--his likely parole eligibility time--in prison, so that the comment about 180 years simply does not raise a factual issue which required an evidentiary hearing to resolve whether his decision to forgo presentation of mitigation and to request the death penalty was based on a misunderstanding of his possible parole eligibility.

Thus, the record shows that there is no material factual dispute about what the attorneys told Lawson, of what matters Lawson was aware, including the scope of sentencing hearings, prior to determining to demand the death penalty. Under these circumstances, once the proffer as to Lawson's competency failed to require an evidentiary hearing, the rest of this claim failed

as well. This was not due to the Fourth Circuit requiring an impermissibly high standard of pleading before granting an evidentiary hearing. Rather, simply on the well established principles of summary judgment jurisprudence, the record did not require the taking of further evidence since the undisputed evidence in the record resolved the claim. Certiorari ought not issue.

IV. THE FOURTH CIRCUIT COURT OF APPEALS DID NOT CREATE AN IMPROPERLY HIGH STANDARD TO DETERMINE WHETHER OR NOT AN EVIDENTIARY HEARING WAS NECESSARY IN FEDERAL COURT ON THE ISSUE OF INEFFECTIVE ASSISTANCE OF COUNSEL. RATHER, THE COURT SIMPLY AFFIRMED THE DISTRICT COURT'S DETERMINATION THAT BASED ON A FULLY DEVELOPED RECORD NO FURTHER HEARING WAS NEEDED.

As his last basis for demanding this Court issue its writ, Lawson asserts that the Fourth Circuit has adopted a uniquely high standard of proof which a petitioner must meet prior to being entitled to an evidentiary hearing on a claim of ineffective assistance of counsel due to an alleged failure to develop and present mental health mitigating evidence. Lawson misreads the opinions below. When read together with the unpublished opinion of the District Court in this case, it is obvious that the Fourth Circuit had not developed a new and unduly rigorous standard for the right to an evidentiary hearing in federal court on an ineffectiveness claim. Rather, the Court simply affirmed the unpublished opinion of the District Court

denying a hearing in this case since the record already was adequately developed.

The opinion of the District Court specifically acknowledges Strickland v. Washington, 466 U.S. 668 (1984) as the proper standard to use, asserts that the summary judgment standard is the one used to determine the necessity for a further evidentiary hearing in federal court. The District Court opinion cites to other effective assistance of counsel cases from other circuits in making its ruling on the effectiveness of counsel in not obtaining additional mental health examinations for Lawson after the competency evaluation had occurred: Felde v. Blackburn, 795 F.2d 400 (5th Cir. 1986) (Counsel might have been ineffective in failing to obtain a mental health evaluation for this petitioner who demanded the death penalty where there was significant evidence of incompetency); Byrne v. Butler, 845 F.2d 501 (5th Cir.), cert. denied, 487 U.S. 1242 (1988) (Demand for the death penalty by a client, alone, not a sufficient basis to hold counsel ineffective for failing to move for a mental evaluation.) Thus, the District Court order clarifies that no improper barrier to an evidentiary hearing has been erected by the federal courts in this case.

The District Court employed the high standard set out in Card v. Dugger, 911 F.2d at 1519-20 and Flugence v. Butler, 848 F.2d 77, 79 (5th Cir. 1988) only to determine whether an evidentiary hearing was necessary on the allegation that Lawson

was incompetent to be sentenced and the related allegation that Lawson was not competent to waive a sentencing hearing. The ineffective assistance of counsel claim was bound up with the competency claim to the extent that if Lawson was competent to waive his right to present mitigation, counsel cannot be held ineffective for following his wishes. King v. Lynaugh, 868 F.2d at 1403-05; Autry v. McKaskle, 727 F.2d at 362; Clanton v. Bair, 826 F.2d 1354 (4th Cir. 1987), cert. denied, 484 U.S. 1036 (1988). However, the Card/Fallada standard was not used to evaluate the need for an evidentiary hearing on the issue of ineffectiveness.

Here, as is true of the need for an evidentiary hearing on the waiver issue raised in Claim III, the record before the federal hearing court was fully developed in the state court proceedings except for some documents which the federal court ordered the record expanded to include. This material fully documented Lawson's conversations with counsel about his mental status, and his alleged lack of use of drugs. The record included counsel's observations of Lawson's mental agility and his general intellectual functioning. The record also included the competency evaluation of Lawson conducted by the Dorothea Dix Hospital staff prior to trial. This report, which raised no serious concerns about Lawson's mental abilities, was received by trial counsel and fully reviewed with Lawson prior to Lawson's determining to request the death penalty.

Once it was determined that the record raised no serious claim that Lawson was incompetent, no further hearing on the issue of ineffectiveness was needed. The record showed counsel were dealing with a seemingly rational man who committed a very callous murder and an attempted murder to cover up an economic crime since he did not desire to go to prison. There was nothing seemingly bizarre about the crime or Lawson's reasons for committing it. The record showed counsel had no reason to believe Lawson was impaired since the Dorothea Dix Hospital report showed no serious mental disorder. The record showed little basis for counsel to believe there was psychological evidence present which would mitigate a remorseless crime their client told them was committed to cover-up a breaking and entering which he committed to supplement his income. Byrne v. Butler, 845 F.2d at 513. The well developed record made a further hearing unnecessary.

Clearly then, the District Court relied on established principles of summary judgment law and decisions on ineffective assistance of counsel, not on an inappropriately high standard of review in declining to permit a further evidentiary hearing in this case. The record affirmatively foreclosed the need for a further hearing since no material fact was at issue.

Any imprecision in the language employed by the Fourth Circuit in its affirmance of the District Court's decision not to permit a further evidentiary hearing, is clarified when read with

the District Court's unpublished opinion. There is no new standard created by this case which conflicts with other circuits concerning when evidentiary hearings are to be held in federal habeas review. Thus, this claim, like the others presented by this petition, fails to raise a certiorari worthy issue.